

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

DECEMBER 31, 2001

IN RE:

DOCKET TO DETERMINE THE COMPLIANCE
OF BELL SOUTH TELECOMMUNICATIONS,
INC.'S OPERATIONS SUPPORT SYSTEMS
WITH STATE AND FEDERAL REGULATIONS

DOCKET NO.
01-00362

ORDER ON PROCEDURAL MATTERS

This matter is before the Pre-Hearing Officer on the Response of BellSouth Telecommunications, Inc. ("BellSouth") to the November 14, 2001 *Order Resolving Procedural Motions* and Applications for Permission to Practice filed by BellSouth on behalf of William B. Hill, Jr., Angela D. Simpson and Jesse L. Fenner.

Background

On September 17, 2001 AT&T Communications of the South Central States ("AT&T"), TCG MidSouth, Inc. ("TCG"), and the Southeastern Competitive Carriers Association ("SECCA") jointly filed interrogatories in this action. Interrogatory No. 36, which is at issue here, stated:

From January 2001 to present, for each individual state in BellSouth's region and for the BellSouth region in total, please identify the achieved flow-through rate and the CLEC error excluded flow-through rate, by interface (*i.e.*, LENS, TAG, EDI and all interfaces) for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residence Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).¹

¹ *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, TRA Docket No. 01-00362 (hereinafter "*OSS Docket*") (*AT&T Communications of the South Central States, TCG MidSouth, Inc. and the Southeastern Competitive Carriers Association, First Set of Interrogatories to BellSouth Telecommunications, Inc.*, p. 16).

On September 24, 2001, BellSouth filed its *Objections to First Interrogatories and Request for Production of Documents of AT&T and SECCA*. Although this document contained numerous objections, it did not include an objection to Interrogatory No. 36.

In its responses to interrogatories, filed on October 12, 2001, BellSouth declined to provide the information requested in Interrogatory No. 36, stating that it “does not produce this data on flow-through rates on a per state basis.” In an attachment to its response, BellSouth provided a file purporting to show “the achieved flow-through rate and the CLEC [competitive local exchange carriers] error excluded flow-through rate, by interface for the months of January 2001 through August 2001.” Nowhere in this discovery response did BellSouth explicitly object to this discovery request or raise the issue of the technical feasibility of responding to this interrogatory.

On November 2, 2001, AT&T and TCG filed a Motion to Compel Complete Answers to specific discovery requests. Among the discovery requests that were purported to be incomplete was Interrogatory No. 36.

The Pre-Hearing Officer addressed the issue of BellSouth’s failure to respond to Interrogatory No. 36 during the November 8, 2001 Pre-Hearing Conference. During the Pre-Hearing Conference, BellSouth did not clearly indicate whether the requested data existed or was available, representing only that it did not know whether the requested data could be extracted in the manner suggested by AT&T.² In response, AT&T asserted that a KPMG witness who worked on the flow-through evaluation in Georgia had testified that BellSouth had the capability to provide state-specific flow-through reports.

² *OSS Docket* (Transcript from November 8, 2001 Pre-Hearing Conference p. 61, 63-64).

In addition, AT&T stated that BellSouth's flow-through reports are a computer program that runs on a database containing flags to identify the state referenced, a fact that could assist in the retrieval of the information.³ AT&T explained that the requested information would either confirm or contradict the claim that BellSouth's ordering systems perform substantially the same from state to state for flow-through purposes.⁴ In response, BellSouth reiterated that it did not produce flow-through reports on a state by state basis and was unsure whether it could.⁵ After hearing considerable argument, the Pre-Hearing Officer directed BellSouth to either produce the requested data or explain in writing why producing such data is not technically feasible. BellSouth was ordered to comply with this directive by November 13, 2001.⁶

BellSouth failed to timely comply with this directive. The Pre-Hearing Officer then addressed the flow-through issue on November 14, 2001, in the *Order Resolving Procedural Motions*, which stated:

6. The Motion to Compel Discovery filed by AT&T and TCG is granted in part as to Interrogatory No. 36. BellSouth is ordered to provide no later than **Tuesday, November 20, 2001** the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in BellSouth's region and for the BellSouth region in total for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residential Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).⁷

³ A deposition taken on September 25, 2001 in the North Carolina §271 proceedings, which BellSouth filed in this proceeding, corroborated AT&T's assertion. Steven Strickland, a KPMG employee, testified as follows:

Q: Do you know whether the LSRs or that the flow-through data that's used to create a performance measures report can be broken down by state?

A: They can . . . the underlying data can. The current report is not. . . There's a state code on each of those transactions.

(Deposition of Steven Strickland, pp. 61-62).

⁴ *OSS Docket* (Transcript from November 8, 2001 Pre-Hearing Conference p. 56).

⁵ *Id.*, pp. 54, 57.

⁶ *Id.*, pp. 63-64.

⁷ *OSS Docket* (*Order Resolving Procedural Motions*, p. 27).

On November 16, 2001, BellSouth filed *Supplemental Responses to Interrogatories and Requests for Production*. BellSouth's document indicates that AT&T issued the following supplemental request with regard to Interrogatory No. 36:

BellSouth states that it does not produce flow-through data on a state-specific basis. According to KPMG, however, BellSouth is capable of producing such data. BellSouth, therefore, should either produce the requested data or explain why producing such data is not technically feasible.⁸

BellSouth responded in pertinent part that

[it] has reviewed the Georgia Third Party Test, Florida Third Party Test Exceptions and Observations as well as the Georgia Third Party Test KPMG Consulting Flow-Through Evaluation Final Report. There is no mention of the state-specific reports or any questions about BellSouth's capability to produce State Specific Reports for Flow-through nor are there any exceptions or observations that addressed this issue . . . BellSouth's position remains the same. AT&T is misinformed on this issue. BellSouth has no record of an issue of state-specific reporting capability for Flow-Through Reports in the Flow-Through Evaluation (FT-1) conducted by KPMG in their OSS Evaluation for the Georgia Public Service Commission. Unless AT&T can identify the KPMG Exception or Observation as part of either the Georgia or Florida Third Party Test, or indicate where this capability is addressed in the Flow-Through Evaluation Final Report, BellSouth maintains that the Flow-Through Report is a regional report as indicated in the SQM. . . If technical feasibility could be determined, the development effort to implement such a measurement would require considerable programming effort and its associated costs.⁹

On November 20, 2001, BellSouth filed a *Motion to Clarify Order Regarding AT&T Interrogatory No. 36*, arguing that "even if it were technically feasible to generate these reports, it is absolutely impossible to do so on one business day's notice." BellSouth also contended that the portion of the *Order Resolving Procedural Motions* addressing Interrogatory No. 36 was inconsistent with the Pre-Hearing Officer's oral

⁸ *OSS Docket* (BellSouth's *Nonproprietary Supplemental Responses to Interrogatories and Requests for Production*, Supplemental Item No. 36, p. 1).

⁹ *Id.*

directive at the Pre-Hearing Conference on November 8, 2001 and that it was not required to create documents not already in existence under Tenn. R. Civ. P. 34.¹⁰

On November 29, 2001, the TRA subpoenaed two BellSouth employees, Ed Davis, Director of KY/TN Centers, and E. Suzanne Allen, Area Manager, AFIG/LNA(TN) of KY/TN Operations. The subpoenas were issued in an effort to determine if the flow-through information existed or was available in a form other than the form contemplated in the Pre-Hearing Officer's November 14, 2001 *Order on Procedural Motions*.

On November 29, 2001, after the subpoenas had issued, BellSouth filed *Second Supplemental Responses to Interrogatories and Requests for Production*, which stated in pertinent part:

The underlying data necessary to calculate such rates does exist, in some form, inasmuch as BellSouth retains information regarding LSRs submitted and information regarding those LSRs in its databases.

Since the data does exist in some form, with the appropriate programming work, time and expenditure, a program could be created that could extract such information on a state-by-state basis.

BellSouth has researched this matter, and has instructed its affected employees to determine what would be required in order to do such programming to respond to the subject data request. In response, those BellSouth employees have indicated that if the task were begun on November 30, 2001, it would take until the first week in March, 2002, and at a substantial cost, to accomplish this task, a period of more than 90 days.¹¹

With this language, BellSouth acknowledged, for the first time in this proceeding, that the requested data existed and could be obtained.

¹⁰ It should be noted that Tenn. R. Civ. P. 34 addresses Requests for Production of Documents. The discovery request at issue is an Interrogatory. Interrogatories are governed by Tenn. R. Civ. P. 33.

¹¹ *OSS Docket* (BellSouth's *Second Supplemental Responses to Interrogatories and Requests for Production*, Supplemental Item No. 36, p. 2).

December 3, 2001 Hearing

The Hearing in this proceeding commenced on Monday, December 3, 2001. The parties in attendance included:

BellSouth Telecommunications, Inc. – **Guy M. Hicks, Esq.**, 333 Commerce Street, 22nd Floor, Nashville, TN 37201-3300 and **R. Douglas Lackey, Esq.**, **Lisa Foshee, Esq.**, and **E. Earl Edenfield, Jr.**, 675 West Peach Street, Suite 4300, Atlanta, GA 30375;

AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. – **Jack W. Robinson, Jr., Esq.**, Gullett, Sanford, Robinson & Martin, 230 Fourth Avenue, North, 3rd Floor, Nashville, TN, 37219 and **Michael A. Hopkins, Esq.** and **Tami Lyn Azorsky, Esq.**, McKenna & Cuneo, L.L.P., 1900 K Street, Washington, D.C. 20006.

Southeastern Competitive Carriers Association (“SECCA”) – **Henry Walker, Esq.**, Boulton, Cummings, Conners & Berry, 414 Union Street, No. 1600, P.O. Box 198062, Nashville, TN 37219-8062.

MCImetro Access Transmission Services, LLC (“MCImetro”) and Brooks Fiber Communications of Tennessee, Inc. (“Brooks Fiber”) – **Susan Berlin, Esq.**, 6 Concourse Parkway, Atlanta, GA 30328 and **Jon E. Hastings, Esq.** Boulton, Cummings, Conners & Berry, 414 Union Street, No. 1600, P.O. Box 198062, Nashville, TN 37219-8062.

Time Warner Telecom of the Mid-South, L.P. and NewSouth Communications – **Charles B. Welch, Jr., Esq.**, Farris, Mathews, Branam, Bobango & Hellen, 618 Church Street, Suite 300, Nashville, TN 37219.

After the Hearing commenced, the Pre-Hearing Officer addressed two unresolved procedural issues. The first issue was BellSouth’s response to AT&T’s Interrogatory No. 36 and the Pre-Hearing Officer’s November 14th *Order Resolving Procedural Motions* which required BellSouth to provide information on the flow-through issue.

The Pre-Hearing Officer heard testimony from several witnesses on the availability and the time purportedly required to obtain the flow-through information including BellSouth witnesses Andrew James Saville, a BellSouth director of interconnection services specializing in the development and production of performance

metrics and Ronald M. Pate, a BellSouth executive who has acted as an expert witness with regard to BellSouth's Operations Support System.¹²

Mr. Saville testified that BellSouth possessed an existing flow-through base that would have to be modified to produce the information at issue.¹³ Mr. Saville testified that BellSouth has approximately 7,800 lines of code for flow-through but only some of the code would need to be rewritten to provide the flow through information.¹⁴ During his testimony, Mr. Saville referred to a chart which delineated the time he felt was necessary to complete the modifications.¹⁵ The chart stated that the modifications would take ninety days, including twenty-eight days for construction, and twenty-nine days for testing.

After considering the record and the testimony, the Pre-Hearing Officer ordered BellSouth to provide the flow-through information ordered in the November 14, 2001 *Order Resolving Procedural Motions* within forty-five (45) days, by January 18, 2002.¹⁶ For the following reasons, this deadline is reasonable and attainable.

BellSouth's computer program for flow-through is not so large as to require a full ninety days in order to revise it. Moreover, as Mr. Saville testified, not all of the lines of code for flow-through would require revision in order to provide the information.

Further, an organization as massive and complex as BellSouth's necessarily has a knowledgeable programming staff, programming methodology, programming standards and documentation rules in -place to simplify soft-ware coding changes by providing blueprints to follow and a history of previous changes. Mr. Saville's testimony reflects

¹² *OSS Docket* (Transcript of Hearing, December 3, 2001, p. 140).

¹³ *Id.* at 146.

¹⁴ *Id.*

¹⁵ Attached hereto as Exhibit A.

the sophistication of BellSouth's management of programming changes.¹⁷ Nevertheless, Mr. Saville proposes to use only one programmer to modify the code in the software modules and to unit test the modules after coding is complete. His sole reason is that the use of only one programmer eliminated the possibility that codes written by different programmers would interact in ways not intended.¹⁸ The record shows that BellSouth revises its systems regularly. Without provisions for dealing systematically with such revisions, BellSouth could not function with the degree of efficiency it clearly has achieved. By utilizing proper programming standards and additional programmers, BellSouth could reduce the twenty-five day construction interval by half.¹⁹

Further, the twenty-nine day testing interval includes sixteen days required for two individuals to validate reports. If two employees can perform this function in sixteen days, it follows that four employees could reduce the time by at least eight days.

In addition, the time Mr. Saville claims is necessary for testing is suspect in light of the fact that BellSouth's testing procedures necessarily must be well-established and would primarily involve nothing more than a standardized series of samplings.

Moreover, the record indicates that the programming itself may not be as time consuming as BellSouth contends. In a deposition taken in North Carolina proceedings under 47 U.S.C. § 271 submitted into this docket by BellSouth, Steven Strickland, a KPMG employee who participated in the flow-through evaluation in Georgia, agreed that "the flow-through data that's used to create a performance measures report can be broken

¹⁶ *OSS Docket* (Transcript of Hearing, December 3, 2001, p. 195).

¹⁷ *See id.* at 144-145.

¹⁸ *See id.* at 147.

¹⁹ The chart Mr. Saville provided contained a mathematical error. It established a twenty-eight day construction interval that consisted of twenty days to code software modules and five days to test software modules.

down by state.”²⁰ Mr. Strickland testified that he believed that, based upon his knowledge of BellSouth’s reporting system, the data could be broken down by state if BellSouth chose to do so.²¹

Mr. Saville’s chart includes a six day period for “implementation.” But Mr. Saville acknowledged that the implementation phase serves BellSouth’s internal operations, allowing it to place a “run book” around the code that is placed in production so the process can be repeated going forward.²² Thus, a six day period for implementation is not necessary to provide a response to Interrogatory No. 36.

Throughout these proceedings, BellSouth has been evasive, at best, regarding the existence and availability of flow-through information on a state by state basis. BellSouth did not acknowledge that the information existed and could be retrieved until just prior to the Hearing in this matter, notwithstanding the facts that 1) Interrogatory No. 36 was served in mid-September; 2) BellSouth did not object to Interrogatory No. 36 by September 24, 2001, as ordered;²³ and 3) BellSouth was ordered to produce the flow-through information on November 14th. BellSouth’s lack of candor and its record of non-cooperation in this docket have damaged its credibility.

Having considered the record in this case, the Pre-Hearing Officer concludes that BellSouth has inflated its estimate of the amount of time necessary to produce the information and BellSouth is capable of producing the required information by January 18, 2002.

²⁰ *In the Matter of Applications of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Services Pursuant to Section 271 of the Telecommunications Act of 1996*, Deposition of Steven L. Strickland (September 25, 2001) pp. 61-62.

²¹ *Id.* at 62.

²² *OSS Docket* (Transcript of Hearing, December 3, 2001, p. 149).

²³ *OSS Docket* (Order Establishing Issues and Procedural Schedule, p. 6)

During the Hearing, the Pre-Hearing Officer also addressed Applications for Permission to Practice filed by BellSouth on December 3, 2001 on behalf of counsel for KPMG, William B. Hill, Jr., Angela Simpson and Jesse L. Fenner.

The Applications indicate that Mr. Hill and Ms. Simpson are licensed and in good standing in the State of Georgia and that no disciplinary actions or investigations are pending against them.²⁴ The Application of Mr. Fenner states that he is licensed and in good standing in the State of Maryland and that no disciplinary action or investigation is pending against him. Said Counsel agree to subject themselves to the jurisdiction of the Tennessee Regulatory Authority (“Authority”) in any manner arising out of their conduct in such proceedings and agree to be bound by the rules governing the conduct of attorneys appearing before the Authority.²⁵


During the Hearing, the parties did not object to the Applications for Permission to Practice. These Applications and comply with Rule 19, Rules of the Tennessee Supreme Court and Tenn. Comp. R. & Reg. 1220-1-2-.04(7). Accordingly, the Applications for Permission to Practice filed by BellSouth on behalf of William B. Hill, Jr., Angela Simpson and Jesse L. Fenner, as counsel for KPMG, are granted.


²⁴ See Rule 19, Rules of the Tennessee Supreme Court.

²⁵ See *id.*

IT IS THEREFORE ORDERED THAT:

1. BellSouth provide to all parties and file with the TRA no later than **2:00 p.m., Friday, January 18, 2002** the achieved flow-through rate and the CLEC error excluded flow-through rate for each individual state in BellSouth's region and for the BellSouth region in total for the following categories: a) LNP; b) UNE; c) Business Resale; d) Residential Resale; and e) Total (*i.e.*, UNE, Business Resale, and Residential Resale combined).
2. The Applications for Permission to Practice filed by BellSouth Telecommunications, Inc. ("BellSouth") on behalf of KPMG counsel William B. Hill, Jr., Angela Simpson and Jesse L. Fenner, as counsel for KPMG, are granted.


Director H. Lynn Greer, Jr.
Pre-Hearing Officer


K. David Waddell, Executive Secretary

	January 2002							February 2002							March 2002																						
December 2001																																					
27	30	3	6	9	12	15	18	21	24	27	30	2	5	8	11	14	17	20	23	26	29	1	4	7	10	13	16	19	22	25	28	3	6	9	12	15	18

Summary	External Tasks	Deadline
Project Summary	External Milestone	

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EXHIBIT